No. 91-6824

In the Supreme Court of the United States

OCTOBER TERM, 1992

GLORIA ZAFIRO, JOSE MARTINEZ, SALVADOR GARCIA AND ALFONSO SOTO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether criminal defendants are entitled to separate trials because they present antagonistic defenses.

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OPINION BELOW

The opinion of the court of appeals, J.A. 110-123, is reported at 945 F.2d 881.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1991. The petition for a writ of certiorari was filed on December 23, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Rule 8, Fed. R. Crim. P., provides in relevant part:

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment

or information if they are alleged to have participated in the same act or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14, Fed. R. Crim. P., provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of various narcotics offenses. All four petitioners were convicted of conspiring to possess cocaine, heroin, and marijuana with the intent to distribute those substances, in violation of 21 U.S.C. 846. In addition, petitioners Garcia and Soto were each convicted of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and petitioner Martinez was convicted of possessing cocaine, marijuana, and heroin with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1). Garcia, Soto, and Zafiro were each sentenced to 151 months in prison, to be followed by five years of supervised release.[1] Martinez was sentenced to 262

[1] The jury acquitted Zafiro of possession with intent to distribute controlled substances. J.A. 110.

months in prison, to be followed by five years of supervised release. J.A. 63-66, 74-77, 96-99, 104-107. The court of appeals affirmed. J.A. 110-123.

1. On February 22, 1989, based on a tip from a confidential informant, Chicago police officers who were members of a Drug Enforcement Administration task force conducted surveillance of the apartment building in Cicero, Illinois, where petitioner Gloria Zafiro lived. Tr. 39-42, 392. That day, the officers saw petitioner Alfonso Soto drive up to the front of the building, look over the area, and enter the building. Tr. 340-342. Soto left several minutes later, and officers followed him along a circuitous route to his house in Chicago. Tr. 44-46, 266-267.

Petitioner Salvador Garcia joined Soto in the alley behind Soto's house. Tr. 46, 267-268. After going into the garage, Soto and Garcia placed a large, heavy box in the trunk of Soto's car. Tr. 267-269. Soto and Garcia then returned by side streets to Zafiro's apartment and carried the cardboard box up the stairs of her building. J.A. 111; Tr. 126-128, 343-344, 377-378. A police officer followed the two, identified himself, and ordered them to stop. J.A. 111; Tr. 49, 128-133. Soto and Garcia then dropped the box and ran into Zafiro's apartment. J.A. 111-112; Tr. 50, 137-138, 157. The police quickly followed, finding all four of the petitioners in the living room. J.A. 112; Tr. 50-51, 345.

The box that Soto and Garcia were carrying contained 27 tightly wrapped packages that appeared to be kilogram packets of cocaine. Tr. 52, 58, 313-314, 456-457. A field test of the contents of one of the packets confirmed that it contained cocaine. Tr. 52. Petitioners were arrested. After obtaining a warrant to search Zafiro's apartment, police officers found in

the bedroom a suitcase containing approximately 25 grams of heroin, 16 pounds of cocaine, and four pounds of marijuana. J.A. 112; Tr. 56-58, 74-75, 321-328, 346-347. Next to the suitcase, the police found a knapsack containing $22,960 in cash. Tr. 57, 272-273.

At the same time, several police officers returned to Soto's house in Chicago. Tr. 53, 270. A woman who identified herself as Mrs. Soto consented to a search of the entire residence. Tr. 53-54, 103-105, 270, 290-291. In the basement, the officers found an Ohaus triple beam gram scale, an item commonly used to weigh drugs. Tr. 54, 106-108. They also found a Ford Probe in the garage, which the officers opened with a key taken from Soto after his arrest. Tr. 55-56. In the trunk of the car the police found approximately seven to eight pounds of cocaine in taped packages that were similar to the packages found in the box seized in Cicero. J.A. 112; Tr. 55-56, 110-112, 160, 271-272. The Ford was registered to Maria Vera, a girlfriend of petitioner Jose Martinez. The evidence at trial showed that Martinez purchased the car, that Vera never used it, and that she last saw it when Martinez lent it to someone in January 1989. Tr. 172-178, 203-204.

2. Pursuant to Fed. R. Crim. P. 14, Garcia and Soto moved to sever their trials on the ground that their defenses "conflict to the point of being irreconcilable and mutually exclusive and inconsistent because each defendant accuses the other of having performed acts which demonstrate culpability." J.A. 82, 102. Soto and Garcia alleged that each would mount a defense based on the theory that he had no knowledge of the contents of the box they transported to Zafiro's apartment and that the other was guilty of

the acts charged by the government. J.A. 81, 101. Martinez moved to sever his trial from Zafiro's on the ground that Zafiro's testimony in her own defense would implicate him. J.A. 70.

The district court denied the motions to sever. J.A. 62, 88-90; Tr. 5. The court reasoned that "[f]inger-pointing is an acceptable cost of the joint trial and at times is even beneficial because it helps complete the picture before the trier of fact." J.A. 89 (quoting *United States* v. *Buljubasic*, 808 F.2d 1260, 1263 (7th Cir.), cert. denied, 484 U.S. 815 (1987)). The court also noted that the jury could accept the defense of Soto or Garcia without necessarily finding that the government had proved its case against the other. J.A. 89.

3. At trial, Soto testified that he had worked with Garcia and had purchased Garcia's home in Chicago when Garcia moved from Chicago in 1987. Tr. 604-606, 658-659. According to Soto, Garcia had returned to stay with him while looking for work, and on the day of their arrests, Garcia asked Soto to drive him to Cicero. Tr. 607-609. Soto denied having any knowledge that he was transporting a box full of cocaine, and he claimed he had never met Zafiro or Martinez before the trip to Cicero. Tr. 611, 663-665. Soto also testified that he had never seen the Ford Probe before, and that Garcia said that someone had lent him the car. Tr. 612, 657, 674-675.

Garcia did not testify at trial, but in closing argument his attorney asserted, contrary to Soto's testimony, that the cardboard box containing the cocaine belonged to Soto, and that Garcia did not know what it contained. J.A. 112; Tr. 838-842.

Zafiro, who was Martinez's girlfriend, testified that Martinez brought the suitcase to her apartment two days before petitioners were arrested but that

she did not know what was in the suitcase. J.A. 112; Tr. 519, 542-543. Zafiro further testified that Martinez came to her apartment on the day of the arrests, asked her to store some cash (which she placed on top of the knapsack found by the police), and went to sleep. Tr. 520-522, 545-547. According to Zafiro, Garcia came to see Martinez that morning, and Soto and Garcia returned later, at which point the police came to arrest them all. Tr. 526-530, 551-559. Zafiro claimed that she had never seen Soto or Garcia before. Tr. 526-527.

Martinez did not testify, but his lawyer argued that Martinez just happened to be in Zafiro's apartment when Soto and Garcia came there to deliver cocaine. Tr. 801. Counsel also argued that Zafiro was seeking to shift blame from herself to Martinez; he pointed out that it was Zafiro, not Martinez, who lived in the apartment where the police found the suitcase full of drugs. J.A. 112; Tr. 804, 806-807.

4. After the jury returned its verdict, Soto moved for a new trial on the ground that the district court erred by not severing his trial from Garcia's because of their antagonistic defenses. J.A. 83. Martinez moved for a new trial because the court did not sever his trial from Zafiro's. J.A. 92. The district court denied both motions. J.A. 73, 95.[2]

[2] After Soto testified, Garcia moved for a mistrial and a severance on the ground that Soto had testified that he was innocent and that Garcia was guilty. Tr. 614. Martinez also renewed his motion to sever after Zafiro's testimony. Tr. 615-616. The court, however, denied those motions. Tr. 615-616. Petitioners unsuccessfully moved for a severance at the close of the evidence and prior to closing arguments. Tr. 748-749. Petitioners then moved for a mistrial and a severance based on the closing arguments in the case, but their motions were denied. Tr. 831-832, 880-881.

5. The court of appeals affirmed. J.A. 110-122. The court observed that Fed. R. Crim. P. 14 "allows severance if a defendant * * * [is] 'prejudiced' by a joint trial," but noted that the Rule says "nothing about mutual antagonism." J.A. 113. The court rejected the principle that defendants are entitled to severance because they raise "mutually antagonistic defenses" at trial: "The fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid 'the scandal and inequity of inconsistent verdicts.'" J.A. 113-114 (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 210 (1987)). Observing that a severance is required "only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants," J.A. 114,[3] the court explained:

> [M]utual antagonism, finger-pointing, and other manifestations or characterizations of the effort of one defendant to shift the blame from himself to a codefendant neither control nor illuminate the question of severance. If it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be ac-

[3] The court offered two examples: First, in "a *complex* case with *many* defendants some of whom might be only *peripherally* involved in the wrongdoing," the court noted the risk that "the bit players may not be able to differentiate themselves in the jurors' minds from the stars." J.A. 114. Second, the court suggested that a joint trial could "throw the jury off the scent * * * where exculpatory evidence essential to a defendant's case will be unavailable—or highly prejudicial evidence unavoidable—if he is tried with another defendant." J.A. 116.

quitted or all convicted—and in either case there would be a miscarriage of justice.

J.A. 116.

The court explained that the benefits of a joint trial "went beyond the avoidance of duplication. The jury was given the full picture, which it would not have had if the trial had been limited to two of the four alleged conspirators." J.A. 117. As a result, the court noted, a joint trial in a case such as this one reduces not only the costs of litigation, but also the risk of error. *Ibid.* Accordingly, the court found that the district court had not abused its discretion in conducting a joint trial.

SUMMARY OF ARGUMENT

When defendants are prosecuted for offenses arising out of the same acts or transactions, Rule 8 of the Federal Rules of Criminal Procedure authorizes the government to indict them together. The law strongly favors joint trials of persons who are indicted together, but initial joinder does not require that the parties remain joined for trial. Under Rule 14 of the Federal Rules of Criminal Procedure, a district court may sever defendants or counts if the conduct of the trial appears likely to prejudice one of the parties. The decision whether to sever a trial is committed to the trial court's discretion, and a defendant can disturb a determination not to sever a trial only if he can show that a joint trial has resulted in unfairness.

In general, joint trials promote the fairness of a criminal trial. Joint trials serve the truthseeking function of criminal procedings because the jury has all of those involved in the events before it at once and therefore obtains a fuller picture of the case.

Those advantages are even more important when the defendants present irreconcilable or mutually exclusive defenses, in which case it is highly likely that at least one of the defendants is giving a false account of the pertinent events. When the defendants present their competing accounts to a single jury, their stories are subjected to sharper adversarial testing, and the jury is more likely to discover the truth. The jury is in a better position to evaluate the relative credibility of the stories or defenses of each defendant when they are all before it at one time. And, by placing all the defendants before the same jury, joinder reduces the likelihood of inconsistent verdicts.

In this case, petitioners have not shown that they were prejudiced by being tried together. Although Soto and Garcia (through his attorney) gave contradictory accounts of the relevant events, as did Zafiro and Martinez (through his attorney), none of them has suggested any basis for concluding the adversarial presentation of their conflicting stories made it less, and not more, probable that the jury rendered a reliable verdict. Nor have they shown any other grounds for concluding that joinder of their charges deprived them of a fair trial.

ARGUMENT

I. THE PRESENTATION OF ANTAGONISTIC DEFENSES DOES NOT DEPRIVE JOINTLY TRIED DEFENDANTS OF A FAIR TRIAL

A. A Joint Trial Is Preferred When Defendants Are Accused of Offenses Arising from the Same Acts, Unless It Would Deny Them a Fair Trial and Result in a Miscarriage of Justice

The general principles governing the conduct of joint trials under the Federal Rules of Criminal Procedure are well settled. Rule 8(b), Fed. R. Crim. P., provides that defendants may be indicted together "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions." Applying that principle, the courts have held that persons who are indicted together should generally be tried together, particularly when they are charged with conspiracy. See, *e.g.*, *United States* v. *Brooks*, 957 F.2d 1138, 1145 (4th Cir. 1992); *United States* v. *Ellender*, 947 F.2d 748, 754 (5th Cir. 1991); *United States* v. *Cross*, 928 F.2d 1030, 1037 (11th Cir. 1991), cert. denied, 112 S. Ct. 594 (1991) and 112 S. Ct. 941 (1992); *United States* v. *Stephenson*, 924 F.2d 753, 761 (8th Cir.), certs. denied, 112 S. Ct. 63 and 112 S. Ct. 321 (1991).

The rationale supporting the preference for joint trials is straightforward. As this Court has explained, the joinder of defendants for trial promotes judicial economy and fairness:

> It would impair both the efficiency and the fairness of the criminal justice system to require * * * that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand.

Richardson v. *Marsh*, 481 U.S. 200, 210 (1987); accord *United States* v. *Lane*, 474 U.S. 438, 449 (1986) ("In common with other courts, th[is] Court has long recognized that joint trials 'conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.'") (quoting *Bruton* v. *United States*, 391 U.S. 123, 134 (1968)). In addition, by avoiding separate trials of guilt arising from joint participation in criminal wrongdoing, joinder "generally serve[s] the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Richardson*, 481 U.S. at 210. Finally, joint trials promote fairness by "enabling more accurate assessment of relative culpability—[an] advantage[] which sometimes operate[s] to the defendant's benefit." *Ibid.*[4]

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[4] "[J]oinder of claims, parties and remedies is strongly encouraged" in the civil context as well. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 724 (1966). For example, the Federal Rules of Civil Procedure provide for broad permissive joinder of defendants in actions arising out of the same transactions or occurrences. Fed. R. Civ. P. 20(a). The Rules of Civil Procedure also provide for compulsory joinder, Fed. R. Civ. P. 19(a), and for class action lawsuits, Fed. R. Civ. P. 23. Rules 19 and 23, moreover, explicitly rely on joinder to address the risk that multiple lawsuits arising from the same controversy will give rise to inconsistent results. Actions for interpleader, Fed. R. Civ. P. 22, are also designed to guard against the possibility of inconsistent results "by requiring the rival claimants to litigate before [a single court] the decisive issue" of entitlement to a single recovery. *Texas* v. *Florida*, 306 U.S. 398, 407 (1939). In civil, as in criminal, cases, joinder serves "the interest

While joint trials are favored, district courts retain authority under Fed. R. Crim. P. 14 to sever trials "[i]f it appears that a defendant or the government is prejudiced by a joinder of * * * [defendants] for trial together." As this Court has consistently recognized, however, the decision whether to grant a severance is a matter for the district court's discretion, not a right of the criminal defendant, and the court's disposition of a motion for a severance is reviewable only for an abuse of that discretion. See *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 486 (1827) (Story, J.) ("where two or more persons are jointly charged in the same indictment, * * * such persons have not a right, by the laws of this country, to be tried severally, separately, and apart, the counsel for the United States objecting thereto; but * * * such separate trial is a matter to be allowed in the discretion of the Court before whom the indictment is tried"); *United States* v. *Ball*, 163 U.S. 662, 672 (1896) ("the question whether defendants jointly indicted should be tried together or separately was a question resting in the sound discretion of the court below"); *Stilson* v. *United States*, 250 U.S. 583, 585-586 (1919) ("That it was within the discretion of the court to order the defendants to be tried together there can be no question, and the practice is too well established to require further consideration."); *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Lane*, 474 U.S. at 449-450 n.12.

It is well settled that a defendant is not entitled to a severance merely because he would have had a

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of the courts and the public in complete, consistent, and efficient settlement of controversies." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 111 (1968).

better chance of being acquitted in a separate trial. See, *e.g.*, *United States* v. *Warner*, 955 F.2d 441, 447 (6th Cir. 1992); *United States* v. *Martinez*, 922 F.2d 914, 922 (1st Cir. 1991); *United States* v. *Manner*, 887 F.2d 317, 326 (D.C. Cir. 1989), cert. denied, 493 U.S. 1062 (1990). Rather, because Rules 8 and 14 are designed to secure the advantages of joinder "where the[y] * * * can be achieved without substantial prejudice to the right of the defendants to a fair trial," *Bruton* v. *United States*, 391 U.S. 123, 131 n.6 (1968), a defendant may obtain relief from the trial court's refusal to sever a joint trial only if he can show that the joint proceeding denied him a fair trial. See, *e.g.*, *United States* v. *Leiva*, 959 F.2d 637, 641 (7th Cir. 1992); *United States* v. *Cardascia*, 951 F.2d 474, 482 (2d Cir. 1991); *United States* v. *Featherson*, 949 F.2d 770, 773 (5th Cir. 1991), cert. denied, 112 S. Ct. 1771 (1992).

B. A Joint Trial of Offenses Arising From the Same Acts or Transactions Enhances the Accuracy and Consistency of the Verdicts

Despite the strong presumption in favor of joint trials and the high threshold for establishing an entitlement to a severance, petitioners contend that the district court abused its discretion by not severing their joint trial because of the antagonistic defenses that they presented. In support of that claim, petitioners rely, Pet. Br. 19-22, on court of appeals decisions that have treated antagonistic defenses as a ground for severance. That reliance is misplaced. Although many court of appeals decisions have recognized antagonistic defenses as a ground for severance in some circumstances,[5] the reasoning of those cases

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[5] For example, some courts of appeals have stated that severance is required when co-defendants present irrecon-

proceeds from a faulty assumption—that the fairness of a criminal trial is compromised by bringing all the conflicting stories before a jury at one time.

1. *Joint Trials Serve the Truthseeking Function and Avoid the Inequity of Inconsistent Verdicts*

"Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Estes* v. *Texas*, 381 U.S. 532, 540 (1965). Indeed, "the very nature of a trial [is] a search for truth." *Nix* v. *Whiteside*, 475 U.S. 157, 166 (1986); accord *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1264 (1991) ("the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence") (quoting *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986)); *Stone* v. *Powell*, 428 U.S. 465, 490 (1976) ("the ultimate question of guilt or innocence

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cilable or mutually exclusive defenses and the jury will unjustifiably infer that the conflict alone establishes that both defendants are guilty. See, *e.g.*, *United States* v. *Clark*, 928 F.2d 639, 644 (4th Cir. 1991); *United States* v. *Walton*, 552 F.2d 1354, 1361 (10th Cir.), cert. denied, 431 U.S. 959 (1977); *United States* v. *Robinson*, 432 F.2d 1348, 1351 (D.C. Cir. 1970). In other cases, the courts have held that a severance is required if the defenses are inconsistent to the degree that accepting one co-defendant's defense would preclude the jury from accepting the other's defense. See, *e.g.*, *United States* v. *Rucker*, 915 F.2d 1511, 1513 (11th Cir. 1990); *United States* v. *Tutino*, 883 F.2d 1125, 1130 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990); *United States* v. *Berkowitz*, 662 F.2d 1127, 1134 (5th Cir. 1981). Still other cases have indicated that to prevail on a motion for severance, a defendant must show that the antagonistic defenses would mislead or confuse the jury. See, *e.g.*, *United States* v. *Benton*, 852 F.2d 1456, 1469 (6th Cir.), cert. denied, 488 U.S. 993 (1988).

* * * should be the central concern in a criminal proceeding").

The interest in accurate factfinding is ordinarily served by giving the factfinder the entire picture of the case before it. As this Court has explained:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. *Nixon*, 418 U.S. 683, 709 (1974). The Court has emphasized in various contexts the importance of providing the factfinder with all relevant information bearing on the question of guilt or innocence. For example, that principle has played a central role in the Court's application of the Fourth Amendment exclusionary rule. See, *e.g.*, *Nix* v. *Williams*, 467 U.S. 431, 443 (1984) (adopting the "inevitable discovery" rule based upon the "public interest in having juries receive all probative evidence of a crime"); see also *Illinois* v. *Gates*, 462 U.S. 213, 257-258 (1983) (White, J., concurring) ("any rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way"). It has also guided the Court's treatment of discovery obligations in criminal proceedings, see, *e.g.*, *Taylor* v. *Illinois*, 484 U.S. 400, 411-412 (1988) (requiring pretrial disclosure of witnesses serves the "broader public interest in a full and truthful disclosure of

critical facts" to the jury); *United States* v. *Nobles*, 422 U.S. 225, 230-232 (1975) (upholding order compelling disclosure of defense investigator's report when disclosure "might substantially enhance 'the search for truth'"); *Williams* v. *Florida*, 399 U.S. 78, 82 (1970) (upholding Florida notice of alibi statute, which was "designed to enhance the search for truth in the criminal trial").

The law of joinder is another area in which the principle of completeness has played an important role. As the courts have recognized, a joint trial directly promotes the ends of criminal justice because "the jury [is] given the full picture," which it would not have if the trial were severed. J.A. 117; see *United States* v. *Sophie*, 900 F.2d 1064, 1083 (7th Cir.) ("trying all participants [in a conspiracy] at once will give a better, and more accurate, picture of the case as a whole"), cert. denied, 111 S. Ct. 124 (1990); *Rakes* v. *United States*, 169 F.2d 739, 744 (4th Cir.) (by "giv[ing] the jury a complete overall view" of alleged criminal conduct, a joint trial "helps [it] to see how each piece fits into the pattern" of alleged wrongdoing), cert. denied, 335 U.S. 826 (1948). To the extent that a severance results in reducing the completeness of the picture of the crime that is presented to the jury, it is likely to impair the ability of the jury to render an accurate verdict.

The "antagonistic defenses" severance doctrine, in particular, is contrary to the principle that the jury system ordinarily functions best when the jury has unrestricted access to relevant information about the crime and those allegedly involved in it. The premise underlying each petitioner's claim in this case is that each should have been permitted to present his or her story to the jury without the risk of rebuttal from the

particular co-defendant to whom he or she was trying to shift blame. Yet that is a formula for inaccurate fact-finding; it is certainly not a premise that should be favored in a system that assumes the truth is most likely to emerge if conflicting factual assertions are subjected to adversarial testing.

As we have noted, the lower courts that recognize antagonistic defenses as a ground for severance have typically insisted that the defenses be irreconcilable or mutually exclusive. The case law, therefore, perversely requires defendants to be tried separately only when one or more of them is necessarily giving a false account of the events with which they all are familiar. But it is in precisely those circumstances that the rationale for joint trials is most compelling. As this Court has emphasized, "[t]ruth * * * is best discovered by powerful statements on both sides of the question," and the adversary process is "the unique strength" of our criminal justice system. *United States* v. *Cronic*, 466 U.S. 648, 655 (1984); see *Maryland* v. *Craig*, 110 S. Ct. 3157, 3163 (1990) ("rigorous adversarial testing * * * is the norm in Anglo-American criminal proceedings"). When different individuals offer different versions of events in which they all participated, the jury's understanding will inevitably be sharpened as each defendant seeks to establish—through testimony, cross-examination, or closing argument—that his story is correct and his co-defendant's is not.

The elimination of the threat of rebuttal by a co-defendant can only increase each defendant's incentive and ability to give a false account of the events with which the co-defendants are both familiar. False testimony, of course, "tends to defeat the sole ultimate objective of a trial" because "it may produce

a judgment not resting on truth." *In re Michael*, 326 U.S. 224, 227 (1945). It is a familiar pattern in severed trials involving multiple alleged offenders that "each defendant will try to create a reasonable doubt by blaming an absent colleague." *United States* v. *Buljubasic*, 808 F.2d 1260, 1263 (7th Cir.), cert. denied, 484 U.S. 815 (1987). Joinder reduces the risk that defendants will adopt that tactic relatively free of risk. As one court has noted, the fact "[t]hat different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than against a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together." *Ware* v. *Commonwealth*, 537 S.W.2d 174, 177 (Ky. 1976).

A joint trial promotes fairness in another way, by reducing the incentive for pretrial maneuvering and reducing the risk that separate juries will reach inconsistent results with respect to severed defendants. In a case such as this one, for example, a single jury in a joint trial would virtually have to conclude that some of the petitioners are guilty; the jury's task would be to decide which, if any, of the petitioners' stories seemed plausible and to convict those whose stories did not. If the defendants were severed for trial, however, each jury could conclude that the particular defendants on trial were telling the truth and that their absent colleagues were the guilty parties, even though the juries' conclusions would be irreconcilable.

Granting severances when defendants announce the intention to present antagonistic defenses creates an incentive for defendants to engage in tactical maneuvering that complicates the pretrial process

and disserves the interests of both judicial economy and fairness. Defendants often seek a severance, not only because they believe they have a better chance of being acquitted if they are tried alone, but also because the defendant who is tried last has the advantage of "knowing the government's case beforehand," *Richardson*, 481 U.S. at 210, and being able to couch his presentation to take advantage of any perceived weak points in the government's case. As a result, it is common to see "codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried." *Bruton* v. *United States*, 391 U.S. at 143 (White, J., dissenting). In that situation, the verdicts may rest not on the jury's assessment of the competing evidence and the relative culpability of each of the defendants, but instead on the order in which the defendants were tried. By contrast, where a single jury chooses at one time among the conflicting stories of all the defendants and the government, "the scandal and inequity of inconsistent verdicts," *Richardson*, 481 U.S. at 210, is eliminated.

2. *A Defendant Is Not Unfairly Prejudiced Because His Co-Defendant Acts as an Accuser*

Petitioners assert, Pet. Br. 17-19, that they were deprived of a fair trial because each was required to face a co-defendant as an additional accuser at trial. That circumstance, however, is not sufficient to constitute prejudice within the meaning of Rule 14, for several reasons.

First, there is nothing unfair or even unusual about a defendant's accomplice testifying against him at trial. The prosecution frequently is able to offer at trial the testimony of an accomplice who might

have been a co-defendant but who instead has received immunity, pleaded guilty, or been convicted in a separate proceeding. The antagonistic defense of a co-defendant at trial is no more prejudicial than the presentation of damaging testimony from one who has already been convicted or who is cooperating with the government. Indeed, a co-defendant's presentation of an antagonistic defense may well be less harmful, because the jury is unavoidably aware that the co-defendant is acting with a very powerful motive to exculpate himself.

Second, any prejudice that might flow from a co-defendant's acting as a "second prosecutor" is offset by the benefit the defendant obtains from the presence at trial of another potentially culpable defendant. As the court of appeals explained in this case:

> [E]ach defendant had to defend himself against the prosecutor and one other defendant but at the same time had a live body to offer the jury in lieu of himself (or herself). Soto could say, "Don't convict me, convict Garcia," and Garcia's lawyer could say, "Don't convict my client, convict Soto." This was apt to be a more persuasive line than telling the jury to let everyone go, when the one thing that no one could question is that the government had found 75 pounds of cocaine on premises connected with these defendants. No defendant was placed at a *net* disadvantage by being paired with another defendant whom he could accuse and who could accuse him in turn, let alone so disadvantaged as to be unable to obtain a fair trial.

J.A. 117.

Third, there is no basis for concluding that the jury is more likely to reach an inaccurate result if

a defendant's attorney cross-examines a co-defendant or seeks to implicate that co-defendant during closing argument. If one defendant's attorney conducts proper and effective cross-examination of a co-defendant, it is likely to enhance the reliability of the verdict. And while a defendant's attorney may implicate a co-defendant or contradict his defense during the closing argument, there is nothing unfairly prejudicial about the jury's hearing such an argument from a co-defendant. Because the jury is unquestionably going to be aware that defense counsel is seeking to exculpate his client, there is every reason to believe that the jury will view counsel's closing presentation with an appropriate degree of skepticism.

We recognize, of course, that there will be instances in which antagonistic defenses are presented and it is appropriate to sever the trials. For example, where a nontestifying defendant has given a confession that facially inculpates a co-defendant, it would be necessary under *Bruton*, 391 U.S. at 136, to try the defendants separately if the damaging material cannot be redacted. Severance might also be warranted if the joint trial encompassed a large number of defendants being tried for a variety of crimes, and the danger of jury confusion were unacceptably high, even with cautionary instructions. Cf. *United States* v. *Lane*, 474 U.S. at 450-451 n.13. Situations such as those, however, can be addressed on a case-by-case basis and do not warrant application of a general rule requiring severance because of the presentation of irreconcilable or mutually exclusive defenses.[6] In

[6] Other risks associated with joint trials can be minimized by appropriate controls exercised by the district court. For example, if an antagonistic co-defendant sought to make an unfairly prejudicial closing argument aimed at another de-

sum, when co-defendants present conflicting accounts of the same events, the adversary presentation of their differing stories presents a fuller picture to the jury, sharpens the presentation of the case, and makes the verdicts more reliable. There is no reason to think that the jury will have any more difficulty sorting through the evidence and arguments because some of them are presented by a co-defendant.

II. PETITIONERS WERE NOT PREJUDICED BY BEING TRIED TOGETHER IN THIS CASE

Petitioners have failed to satisfy their burden of showing that, because they were tried together in this case, they received an unfair trial. To the contrary, petitioners have shown nothing more than that each of them was exposed in the joint trial to inculpatory evidence or argument from his or her co-defendant. For example, petitioners Soto and Garcia gave contradictory accounts of who went to petitioner Zafiro's apartment on the morning they were all arrested. And Soto complains that he was denied a fair trial because "instead of determining * * * the credibility of Soto, [the jury] had to determine Garcia's credibility in conjunction with Soto." Pet. Br. 11. Petitioner Martinez claims that he was prejudiced by being tried with Zafiro because Zafiro testified that the suitcase full of drugs found in her apartment belonged to Martinez, and that Soto and Garcia were coming to see Martinez when they brought the box full of cocaine. See *id.* at 14 ("Had the trial judge severed * * * [their] trials, the jury never would have heard Zafiro's prejudicial and biased testimony.").[7] Zafiro, in turn, contends that she was denied a fair trial because Martinez (through counsel) denied any knowledge of the illegal drugs that were found in or delivered to Zafiro's apartment. *Id.* at 14-15. Finally, Garcia claims that he was unfairly prejudiced because his defense at trial—that he never possessed any cocaine—was directly contradicted by Soto's testimony. *Id.* at 16-17.

Petitioners' claims amount to no more than assertions that they were subjected to contradiction by a co-defendant at trial. As we have discussed, there is nothing inherently unfair to a defendant about being contradicted by a co-defendant, and there was nothing unfair about exposing the jury to the conflicts among the defenses in this case. On the contrary, the verdicts were, if anything, more accurate because the jury, by hearing the accounts of all four petitioners, was apprised of the complete picture. Because Soto and Garcia differed about who had gone to Zafiro's apartment and who possessed the box full of cocaine, neither was able to assert without contradiction that the other was responsible for the drugs. Perhaps Soto and Garcia would have had a better chance of

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fendant—for example, an appeal to racial bias or an argument based upon facts not in evidence—the argument could be controlled by the court. A defendant is not entitled to make an improper closing argument, see *United States* v. *Young*, 470 U.S. 1, 13 (1985), and the possibility that a defendant will seek to make such an argument is no reason to adopt a flat rule against joining defendants who present antagonistic defenses. See *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2608 (1991) (risk of prejudicial conduct in particular cases, which is subject to control by the court, is not a sufficient reason for a general rule against a practice such as permitting the use of victim impact evidence in capital sentencing proceedings).

[7] In addition, Martinez complains that Zafiro's attorney emphasized Martinez's relationship with Maria Vera, another girlfriend of Martinez, whose car was found in Soto's garage with a large quantity of cocaine in the trunk. Pet. Br. 11-12.

acquittal if they had been tried separately, but it is likely that the jury in the joint trial was able to make a better assessment of their defenses because it was aware of them both.[8]

Similarly, although a separate trial might have allowed Martinez to claim ignorance of the contents of the suitcase without contradiction by Zafiro,[9] that

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[8] Former Chief Judge Clark made the same point forcefully in a case involving two co-defendants charged with possessing a weapon that had been found in the presence of both:

> The common defensive tactic used by both Crawford and Blanks was to claim that the other was the sole possessor of the contraband weapon. While the I-didn't-he-did defense of each defendant was antagonistic to the use of the same tactic by the other defendant, the common assertion of these cross-accusations could be reconciled under the third possibility: joint possession. * * * Even aside from the fact that [the weapon was] as apparent as an elephant in a bathtub, the government's contention of joint possession should not be ignored in the balancing process. The prejudice to prosecution resulting from separate trials in which each defendant could lay off on the other (who could make himself unavailable by invoking the fifth amendment) was a proper weight to place in the scales. The interest of the people in justice, which would be served by allowing a single jury to decide [among] the three possible versions * * * outweighs the privilege of the defendants to enjoy an advantage in the presentation of their respective disclaimers.

United States v. *Crawford*, 581 F.2d 489, 492-493 (5th Cir. 1978) (Clark, J., dissenting).

[9] Of course, Martinez's freedom from Zafiro's testimony would have been a function of happenstance. If Zafiro had been tried first and given immunity in exchange for her testimony, or if she had agreed to testify pursuant to a guilty plea or other cooperation agreement, Martinez would have been subject to her testimony in any case.

would only have meant the jury would have reached its verdict without ever knowing that Zafiro's position was that the suitcase belonged to Martinez.[10] While it is true, as Martinez notes, Pet. Br. 14, that Zafiro's testimony was subject to impeachment because of her motive to exculpate herself, the jury was obviously aware of her interest in the case and could take that factor into account in determining how much to credit Zafiro's testimony. It may well be that Martinez and Zafiro would have had a better chance of being acquitted if they had been tried separately, but those verdicts would have been based on incomplete information and thus would have been less reliable and potentially inconsistent as well.

Petitioners do not allege that any evidence was introduced at trial that could not have been introduced if the defendants had been severed for trial. Nor do they suggest that during closing argument their co-defendants made any unfairly prejudicial remarks that the prosecution would not have been permitted to make. Petitioners also do not challenge as insufficient the court's instruction regarding the jury's duty to "give separate consideration to each individual defendant and to each separate charge against him." Tr. 865. Indeed, the acquittal of Zafiro on several of the counts demonstrates that the jury was able to understand and compartmentalize the evidence presented at trial. See, *e.g.*, *United States* v. *Smith*, 918

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[10] Martinez's claim of prejudice from the testimony and argument relating to Maria Vera is similarly misplaced. If Martinez had been tried separately, the prosecution could still have introduced Vera's testimony. Accordingly, the prosecution could readily have shown that Vera was Martinez's girlfriend and that the police found cocaine in her car, just as police officers found cocaine in the apartment of Zafiro, another girlfriend of Martinez.

F.2d 1551, 1561 (11th Cir. 1990); *United States* v. *Nevils*, 897 F.2d 300, 305 (8th Cir.), cert. denied, 111 S. Ct. 125 (1990); *United States* v. *Garcia*, 848 F.2d 1324, 1334 (2d Cir. 1988), cert. denied, 489 U.S. 1070 (1989). Because petitioners have failed to identify any specific grounds for concluding that their joint trial rendered the jury's verdict unreliable, and because the mere presence of antagonistic defenses is not sufficient to justify a severance, the court of appeals was correct in holding that the district court did not abuse its discretion in deciding to try all four petitioners together.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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